MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket Number Oxf 21-412

J.P. Morgan Acquisition Corp.

Plaintiff-Appellant

v.

Camille J. Moulton

Defendant-Appellee

ON APPEAL FROM SOUTH PARIS DISTRICT COURT

District Court Docket No. SOPDC-RE-19-02

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did Plaintiff's notice of default and right to cure ("Notice") strictly comply with the requirements set forth in 14 M.R.S. § 6111?
    a. Did the discrepancy between the total amount due to cure the default and the accompanying itemization of the total amount due to cure the default cause the Notice to be ambiguous?
        i. If the Notice *was not* ambiguous, did the discrepancy between the total amount due to cure the default and the accompanying itemization of the total amount due to cure the default cause the Notice to be fatally flawed as a matter of law?
        ii. If the Notice *was* ambiguous, does the ambiguity relating to the cure amount create an issue of material fact, or does the ambiguity relating to the cure amount within the Notice cause the Notice to be fatally flawed as a matter of law?
2. Does the court have the authority to make declarations as to the title of real estate that is the subject of a real action?
3. Was the Trial Court entitled to rely on the parties' admissions in their statements of material fact regarding Plaintiff being the holder of the Mortgage?

SUMMARY OF THE ARGUMENTS

I. The Superior Court properly applied the strict compliance standard to the notice requirements set forth in 14 M.R.S. § 6111. The Notice did not comply with the notice requirements. Therefore, Plaintiff was unable, as a matter of law, to demonstrate strict compliance with 14 M.R.S. § 6111 (§ 6111).

A. There are no factual or contractual ambiguities at issue before the Court. The only dispute between the parties are contractual interoperation and application of the statute.

B. An itemization is the breakdown of a whole into its constituent parts. An Itemization cannot be different from the sum it is itemizing.

C. The total amount due to cure the default was inaccurately inflated due to Plaintiff's failure to credit the paid, yet unapplied, funds against the total amount due to cure the default. The inaccurate inflation of the cure amount is illustrated in the itemization attached to the Notice.

D. Plaintiff's proposed interpretation to resolve the discrepancy between the total amount due to cure the default and the itemization is contrary to the plain language of the Notice. Even if Plaintiff's proposed interpretation was accepted by the court, Plaintiff's argument creates another deficiency within

the Notice because the cure amount would not be a precise amount properly frozen during the cure period.

E. The deficiencies within the Notice are not distinguishable from the deficiencies presented in prior caselaw.

II. The Trial Court was entitled to issue a declaration of title.

A. Plaintiff's foreclosure action is a real action that involves the title to real estate and is therefore governed by M.R. Civ. P. Rule 80A. Pursuant to M.R. Civ. P. Rule 80A(f), a real action judgment must make a declaration as to the Plaintiff's title in the real estate that is the subject of the litigation. The court was well within its discretion to declare that Plaintiff no longer had any interest in the mortgaged property.

B. A claim for declaratory judgment under 14 M.R.S. §§ 5951 *et seq.* is not required for the Court to issue a declaration of title. Plaintiff's foreclosure action seeks a judgment from the court declaring the rights, status and other legal relations of the parties to the mortgaged property. The fact that the declaration entered is unfavorable to the Plaintiff does not preclude the court from entering a declaration of title to the mortgaged property.

III. The Trial Court properly accepted the parties' assertions that the Plaintiff is the holder of the Mortgage.

A. The Court's comments, in footnote 7 of the Order on Defendant's Motion for Summary Judgment, regarding additional evidence being necessary to demonstrate the effectiveness of the Quitclaim Assignment was obiter dictum; it was not part of the holding. The obiter dictum was an aside highlighting for the parties that Plaintiff would need to submit additional evidence at trial to establish that Plaintiff was the holder of the mortgage.

B. Facts not properly controverted are deemed admitted for the purposes of summary judgment. Both parties' statements of material facts admitted, and provided supporting record citations, that the Mortgage had been assigned to the Plaintiff and that the Plaintiff was the holder of the Mortgage. It is within the court's discretion to accept a statement of fact admitted and summarily supported by the record.

C. The Plaintiff, asserted that it had standing in the pleadings and motions filed in this action. The Trial Court's Order on Defendant's Motion for Summary Judgment found sufficient standing to enter an order on the merits. The Plaintiff's only argument regarding the obiter dictum on standing was that it could have preclusive effects in a subsequent trial. However, facts admitted for the purpose of summary judgment have no preclusive effect at trial. Therefore, there is no issue on standing properly before the court.

ARGUMENT

I. The Trial Court properly applied the strict compliance standard to the Notice relating to the 14 M.R.S. § 6111 requirements.

The lack of a correct sum certain required to cure the default within a notice of default fails to strictly comply with the notice requirements established in §6111. *Bank, N.A. v. Lowell*, 2017 ME 32, ¶ 21, 156 A.3d 727 (Me. 2017). If a notice of default does not meet the requirements set forth in §6111 the prima facia elements of a residential foreclosure claim cannot be met as a matter of law. *Bank of America, N.A. v. Greenleaf (Greenleaf I)*, 2014 ME 89, ¶ 31, 96 A.3d 700; *see also Chase Home Fin. LLC v. Higgins,* 2009 ME 136, ¶ 11, 985 A.2d 508. In order to avoid a summary judgment in a residential mortgage foreclosure action a plaintiff must, at a minimum, demonstrate that it will be able to make its prima facie case, including a showing that the plaintiff will be able to produce evidence to establish its strict compliance with the notice requirements set forth in 14 M.R.S. § 6111. *Greenleaf I* at ¶18; *See also Higgins* at ¶ 11. "[I]f the court determines on a motion for summary judgment that a foreclosure plaintiff would be unable to prove a necessary element of its substantive claim, then the court must enter judgment for the defendant."

Bellisle at § II; *citing Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 9, 123 A.3d 216.

The Trial Court found no reason to depart from the strict compliance standard, stating: "In light of the prodigious amount of Maine case law interpreting section 6111 as requiring a strict compliance with its provision, as well as the plain language of M.R. Civ. P. 56(j)" the total amount due to cure the default must be the same number as provided in the itemization of all past due amounts causing the loan to be in default.[1] (A. 17). § 6111 separates "the total amount due to cure the default" into two categories. §6111(1-A)(B) requires a notice of default to include "an itemization of all past due amounts causing the loan to be in default." § 6111(1-A)(C) requires a notice of default to include "an itemization of any other charges that must be paid in order to cure the default." Collectively, these separate amounts make up the contents of the "itemization," which provides a line-item breakdown of "the total amount due to cure the default" (the "cure amount"). 14 M.R.S. §6111(1-A(B)-(C) (Emphasis Added). The Plaintiff proposes that for the purposes of a summary judgment the itemization does not have to be exactly the same number as the cure

[1] In the Order on Defendant's Motion for Summary Judgment, the Trial Court summarized the Plaintiff's argument as being that "itemization of all past due amounts causing the loan to be in default" does not have to be the same number as the "total amount due to cure the default." This summary does not address a nuance regarding the relationship between § 6111(1-A)(B)-(C). § 6111(1-A)(B)-(C) sets forth two separate categories of amounts that must be itemized, and "the total amount due to cure the default" comprises all of those amounts. Therefore, it would be inaccurate to say that the "total amount due to cure the default" has to be the same number as the "itemization of all past due amounts causing the loan to be in default" because "the total amount due to cure the default" also includes "an itemization of any other charges that must be paid in order to cure the default."

amount, because ambiguities are viewed in a light most favorable to the Plaintiff. (Appellant's Brief, pages 10-11). Plaintiff's argument fails in two respects. First, Plaintiff incorrectly portrays the parties dispute regarding the interpretation of the Notice and application of the strict compliance standard to the § 6111 requirements as factual ambiguities rather than matters of law. Plaintiff further confuses the issue by conflating the various contexts in which "ambiguity" can exist, namely: (1) the court's standard of review when presented with an "ambiguity" relating to the existence of a genuine issue of material fact; (2) the court's determination as to whether an "ambiguity" exists within the language of a contract; and (3) the application of the strict compliance standard to a notice of default that contains an "ambiguity" relating to the cure amount. Second, the Plaintiff relies on a logical fallacy that the itemization of a number can be different from the number being itemized.

A. There are no factual or contractual ambiguities at issue.

Factual and contractual ambiguities are handled differently under the law. Ambiguity, in the context of the existence of a genuine issue of material fact, relates to the degree of credibility and persuasiveness of competing versions of the facts. When factual ambiguities exist, a fact-finder is required to "choose between

competing versions of the truth." *Casco Northern Bank v. Pearl,* 584 A.2d 643, 645 (Me. 1990), citing *Bailey v. Gulliver*, 583 A.2d 699 (Me. 1990); *Estes v. Smith*, 521 A.2d 682, 683 (Me. 1987); *2 Field, McKusick & Wroth, Maine Civil Practice §56.2a* at 36 (2d ed. 1970); *See also Cookson v. Brewer School Dept.*, 974 A.2d 276, 2009 ME 57 ¶12 (Me. 2009). Ambiguity, in the context of the language of a contract, relates to the susceptibility of the language to different interpretations. *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1387 (Me. 1983). "The question of whether a contract is ambiguous, and if unambiguous, the interpretation of that contract, are questions of law and are reviewed de novo." *Moody v. State Liquor & Lottery Commission*, 2004 ME 20 ¶16, 843 A.2d 43 (Me. 2004).; *citing Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶ 8, 756 A.2d 515, 517; *Briggs v. Briggs*, 1998 ME 120, ¶ 6, 711 A.2d 1286, 1288.

There is no question of "ambiguity," whether contractual or relating to the existence of a general issue of material fact, presently before the Court. Nonetheless, Plaintiff attempts to characterize the parties dispute regarding the interpretation of the Notice as an ambiguity in the Notice. (Appellant's Br. 11-13, 17). However, as discussed further below, the plain language of the Notice is not reasonably susceptible to different interpretations. Thus, the plain language of the Notice should be interpreted as the court interprets statutory provisions "according to their

unambiguous meaning unless the result is illogical or absurd." *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104.

"Statutory interpretation is a matter of law in which our primary purpose is to give effect to the intent of the Legislature . . . If the statutory language is clear and unambiguous, we construe the statute in accordance with its plain meaning . . ." *State v. Bragdon*, 2015 ME 87, 120 A.3d 103 (Me. 2015) (citation and quotations omitted). Although (standard of review) ambiguity relating to the existence of a material fact are viewed in a light most favorable to Plaintiff, the determination of the absence or existence of (contractual language) ambiguity within the Notice is a question of law, and the existence of (contractual language) ambiguity alone does not axiomatically create a genuine issue of material fact. *Moody* at ¶16-18. The (contractual language) ambiguity would have to be susceptible to an alternative interpretation, which if proven would allow Plaintiff to establish its prima facie case. *Id.* Furthermore, in a foreclosure case, such as this, the (contractual language) ambiguity within a notice of default cannot create uncertainty regarding the precise cure amount, because that ambiguity would be a sufficient defect to preclude a plaintiff from establishing prima facia compliance with the § 6111 notice requirements. *Bellisle at §III(A) and footnote 1; See also Greenleaf at ¶31; Lowell at ¶¶ 19-21.*

The various standards and definitions of ambiguity notwithstanding, the dispute between the parties does not relate to an ambiguity within the facts or the contract language. Rather, the dispute is a question of interpretation of the clear language of the Notice and the compliance of the Notice with §6111 based on the interpretation of that language.

B. A cure amount must be the total of an itemization.

The Plaintiff's argument that a cure amount can be different from the itemization of that cure amount is counter to the underlying principles of what an itemization is. An itemization presents a breakdown of a whole into its constituent parts. The total amount of an itemization and the itemized breakdown of its constituent parts are causally linked. With all due respect to Aristotle, from a mathematical standpoint the whole cannot be greater than the sum of its parts. Any disagreement between the whole and its constituent parts is a miscalculation.

A basic example of itemization as a mathematical expression is:

$a + b + c - d = x$; where "x" represents the total (or cure amount) and "a" through "d" represent the constituent parts (the itemization). Plaintiff argues that where: $a + b + c - d = x$, and $a + b + c = y$, that stating the cure amount as "y" should be

sufficient because even though $a + b + c - d \neq y$ and therefore $x \neq y$ upon careful review one could find Plaintiff's calculation error and that $y - d = x$.

This issue (i.e., Is an incorrect answer cured because the computational error is identifiable?) is one that is dealt with by math teachers on a regular basis. The Plaintiff asks that the Court interpret their itemization and cure amount as correct, even though they provided the wrong cure amount in the Notice. The error in the calculation is clearly presented on the itemization, showing a failure to subtract the credit for the paid, yet unapplied, funds. (A. 67, 71). However, the ability to determine where the Plaintiff went wrong in their calculations to reach the total cure amount does not change the fact that they did not provide an accurate cure amount. No amount of mental acrobatics to view the Plaintiff's calculation error in a light most favorable to Plaintiff overcomes the clear inaccuracy of the cure amount stated in the Notice. The failure to provide the correct cure amount causes the Notice to be defective and precludes Plaintiff from being able to demonstrate that it could establish the prima facia elements for foreclosure as a matter of law. *United States Bank Trust, NA. v. Jones*, 330 F. Supp. 3d 530, 537-38 (D. Me. 2018), aff'd, 925 F.3d 534 (1st Cir. 2019); *Lowell* at ¶ 19-21.

C. The total amount due to cure the default within the Notice was inaccurately inflated.

As previously discussed in this brief, the cure amount within the Notice is different from the itemization. (A. 67, 71). This difference arises from the lack of inclusion of the unapplied funds in the calculation of the cure amount. (A. 67, 71). The itemization must be correct and agree with the cure amount. "§ 6111 implicitly requires an accurate or "precise" itemization. The Maine Legislature could hardly have intended to force lenders to send notices itemizing the amounts for the borrowers right to cure to the borrower while also allowing lenders to foreclose even if those amounts are inaccurately inflated." *Jones* at 537. The sum certain cannot require computation or inquiry on the part of the mortgagee; ". . . the amount due as stated in the notice of default is the precise amount that the mortgagor has thirty-five days to pay in order to cure the default." *Greenleaf* I at ¶ 31; *Lowell* at ¶ 19-21. Where the cure amount is inaccurately inflated due to Plaintiff's failure to credit the unapplied funds paid by Defendant, the Notice has failed to strictly comply with §6111. *Jones* at 537-38; *Lowell* at ¶19-21.

D. Plaintiff's proposed interpretation of the Notice does not cure its deficiencies.

Plaintiff argues that, contrary to the plain language of the Notice, the cure amount is modified by the itemization. (Appellant Br., 10-12). For the Court to be

able consider Plaintiff's argument as to how the itemization modifies the cure amount, the court must first accept Plaintiff's assertion that "the total amount to cure the default" stated in the Notice of default was not "the total amount due to cure the default" required pursuant to § 6111. 14 M.R.S. § 6111(1-A)(B). The cure amount must be a sum certain frozen during the cure period. *Lowell* at ¶21. For the cure amount to be a sum certain frozen during the cure period, the unapplied funds would need to be applied to the total amount due to cure the default, at least for the duration of the cure period. If those funds are not applied for the purpose of calculating the cure amount, an inaccurately inflated cure amount would result because the Defendant would actually have to pay in excess of the cure amount to cure the default. The unapplied funds having been applied for the purpose of establishing the cure amount would result in a lower cure amount than the cure amount stated in the Notice. (A. 67) Because the Plaintiff knows the cure amount in its notice was inaccurately inflated, Plaintiff attempts to justify the inflated cure amount by explaining why the cure amount was inflated. (Appellant's Br. 10). However, Plaintiff's explanation, even if accepted, would result in other deficiencies within the Notice.

Plaintiff proposed interpretation suggests that the total amount due to cure the default was, in fact, $20,930.04, as stated on the first page of the Notice of Default. However, because the itemization included a credit of $672.38, said credit acted to

reduce the itemized total to $20,257.66, which Plaintiff contends should be considered the cure amount. (A. 67, 71; Appellant's Br. 10-12). However, Plaintiff continued to classify the unapplied funds as unapplied funds in the itemization and did not credit the unapplied funds to the total on the first page of the Notice of Default. (A. 67, 71). Pursuant to the Plaintiff's interpretation of the terms of the mortgage, unapplied funds can either be applied or returned to the mortgagor at the mortgagee's discretion. (A. 54, Appellant's Br. 12). Therefore, the cure amount would be contingent on what Plaintiff did with the unapplied funds. If the unapplied funds were applied, the cure amount would be $20,257.66. If the unapplied funds were returned, the cure amount would be $20,930.04. The only way for the Defendant to determine whether or not the unapplied funds had been applied during the cure period would have been to contact the Plaintiff. The Defendant would not be entitled to assume that the funds had been applied, because if they had, the cure amount provided on the first page of the Notice of default would reflect that lesser cure amount. The total amount due to cure the default was therefore not a precise amount properly frozen during the cure period as required by § 6111.

The Plaintiff's suggestion that the Defendant's knowledge and state of mind were relevant to the Trial Court's holding is incorrect. One of the Plaintiff's arguments had been that the Defendant was aware of the unapplied funds and that those funds would be credited against the cure amount. (Appellant's Br. 11-13).

Therefore, the "gross" cure amount on the Notice was correct, because the Defendant could figure out that the "net" cure amount would be reduced by the unapplied funds. (Appellant's Br. 9-11, 17). As part of the Trial Court's analysis of the Plaintiff's argument, the Trial Court indicated that Plaintiff had failed to submit evidence into the record that demonstrated that the Defendant should have been aware of the unapplied funds and how they were being applied to the cure amount. (A. 17-18) The Trial Court's reference to the Defendant's knowledge or state of mind was done to demonstrate that even viewed in a light favorable to the Plaintiff, the Plaintiff had not made a prima facie showing of its strict compliance with § 6111. (A. 17-18)

E. The deficiencies within the Notice are not distinguishable from prior caselaw.

Plaintiff argues that the facts before the Court are distinguishable from prior cases interpreting the § 6111 strict compliance standard. (Appellant's Br. 13-15). However, Plaintiff's arguments are based on its erroneous interpretation of the Notice and illogical mathematical theories. Plaintiff characterizes the cure amount stated within the Notice as the "gross cure amount" and suggests that because the credit is applied in the itemization and shows the "net cure amount" that the cure amount is correct. (Appellant's Br. 9-11, 17). As previously discussed, where the

cure amount must be a sum certain, there can only be one cure amount, and there can be no gross cure amount because it either fails to properly itemize the cure amount or fails to properly freeze the cure amount during the cure period.

The facts before the Court are not distinguishable from *Greenleaf I or Lowell* because the Notice, by providing conflicting cure amounts, fails to provide a "precise" cure amount. *Greenleaf* at ¶ 31; *Lowell* at ¶ 21. Under Plaintiff's interpretation, the Notice would also not freeze the cure amount during the cure period. *Bellisle* at §III(A) and footnote 1; *Greenleaf* at ¶31; *Lowell* at ¶¶ 19-21. If conflicting statements within the notice created ambiguity as to what the cure amount is, then the § 6111 requirements were not met. *Id.*

The facts before the court are consistent with *Jones*, which involved a cure amount that overstated the actual amount that would be required to cure the default. *Jones* at 537. "Blocking a lenders foreclosure based on a mathematical or accounting error may be harsh to the mortgagee in some cases. But the Maine Supreme Judicial Court has taken a rigid approach to signal to lenders, servicers, and their attorneys that they must be thorough and meticulous when pursuing foreclosures in order to prevent a claim-preclusive judgment in favor of the borrower. *Id* (*emphasis added*).

Plaintiff goes on to argue that strict compliance does not mean perfection and asks the Court to adopt a de minimums or harmless error rule. (Appellant's Br. 15-18). Plaintiff is correct that the standard for a § 6111 notice is strict compliance and

not perfection. A Notice that contains additional unnecessary information, or has typographical errors that do not affect required portions of a notice of default, would not invalidate a notice of default due to those imperfections. However, with regard to the cure amount, which is the most important element of a notice of default, all other requirements being secondary to or supportive of the stated cure amount, strict compliance should equal perfection. To suggest that a plaintiff, who is required to provide notice of default and the right to cure, could inaccurately state the cure amount, but still strictly comply with the notice requirement goes against the plain language of 14 M.R.S. §§ 6111 and 6321. 14 M.R.S. §§ 6111(1-A)(B) and 6321; *Jones* at 537.

II. The Trial Court was entitled to issue the Title Decree.

A. Rule 80A(f) Maine Rules of Civil Procedure

The case at hand was filed as a real action, and as such falls within M.R. Civ. P. Rule 80A. *M.R. Civ. P. Rule 80A(a)*. The court is required to make declarations of title to real estate in real actions. *M.R. Civ. P. Rule 80A(f)*. "The judgment shall declare the estate, if any, in all or in any part of the demanded premises to which the plaintiff is entitled." *Id.* "An action under this rule may be

used for the purpose of the foreclosure of a mortgage of real estate as provided by law." *M.R. Civ. P. Rule 80A(g).*

The Trial Court's declaration that the Plaintiff no longer has any interest in the Mortgaged Property falls squarely within its authority, and is actually required to be included as part of the judgement. *M.R. Civ. P. Rule 80A(f).* A foreclosure action by its very nature requires that the court enter a declaration as to the title of real estate, and that declaration of title is the essence of what a plaintiff seeks. Where the remedy sought necessitates a declaration of title, it is illogical to suggest that such a declaration is limited to judgments that are favorable to a plaintiff. "In determining the plain meaning of words, [the court] will not imply limitations where none appear." *Joyce v. State*, 2008 ME 108, ¶ 11, 951 A.2d 69 (Me. 2008); citing *In re Adoption of M.A.*, 2007 ME 123, ¶ 14 n. 3, 930 A.2d 1088, 1093. Plaintiff suggests that a court's jurisdiction is limited to declarations of title that maintain or increase Plaintiff's title. (Appellant's Br. 21). In the absence of such a declaration as to Plaintiff's interest in the mortgage property, the Defendant would be entitled to seek a declaratory judgment to remove the encumbrance of the mortgage. However, this subsequent declaratory judgment action only arises in cases where a judgment fails to comply with M.R. Civ. P. Rule 80A(f).

B. A declaration of title does not require a Declaratory Judgment Action.

A specific count within a pleading for declaratory judgment under 14 M.R.S. §§ 5951 *et seq.* is not required for the Court to issue a declaration of title. 14 M.R.S. §§ 5953. The Plaintiff's foreclosure action seeks a judgment from the court declaring the rights, status and other legal relations of the parties to the Mortgaged Property. (A. 23-24). The fact that the declaration entered is unfavorable to the Plaintiff does not preclude the court from entering a declaration of title to the Mortgaged Property. *Joyce* at ¶ 11.

Plaintiff improperly applies the court's reasoning in *Pushard v. Bank of America, N.A.* to its analysis of 14 M.R.S. §6206. *Pushard v. Bank of America, N.A.*, 2017 ME 230 ¶16, 175 A.3d 103 (Me. 2017) (finding that, for the purposes of 33 M.R.S. § 551, a judgment in a foreclosure in defendant's favor was not equivalent to satisfaction of a mortgage).

33 M.R.S. § 551 provides for when and how a mortgagee must execute and record a discharge of mortgage. 33 M.R.S. §551. A discharge of mortgage under 33 M.R.S. § 551 is not required until after full performance of the conditions of the mortgage and satisfaction thereof. *Id.* These requirements are not present in 14 M.R.S. § 6206, and in order for the court to hold the land discharged from a mortgage, it need only find that nothing is due on the mortgage. 14 M.R.S. §6206. In fact, the Court in *Pushard* went on to find that the bank, having failed to prove

its foreclosure claim, no longer had any enforceable interest in the note, or in the property securing the note, and the defendants hand no further obligation to make payments on the note. *Pushard* at ¶35. The mortgagors were therefore entitled to declaratory relief that the mortgage no longer encumbered their property. *Id* at ¶ 36. "... [E]very judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings." M.R. Civ. P. Rule 54(c).

III. The Trial Court properly accepted the facts admitted by the parties.

The parties admitted that Plaintiff was the holder of the Mortgage for the purposes of summary judgment.[2] (A. 34 ¶ 4, 37 ¶ 4). Facts not properly controverted are deemed admitted for the purposes of summary judgment. Neither party attempted to contest Plaintiff's claim that it is the holder of the Mortgage. Facts admitted for the purpose of summary judgment have no preclusive effect at trial. M.R. Civ P. Rule 56(h)(4). Both parties' statements of material facts affirmed that the Mortgage had been assigned to the Plaintiff and that the Plaintiff was the holder of the Mortgage and provided record citations supporting that fact. (A. 34 ¶

[2] It is worth noting that the standard of review requires the Court to view issues of material facts in a light most favorable to the Plaintiff. Since being the holder of the Mortgage is a required element of Plaintiff's claim, the light most favorable to Plaintiff would be that it could properly establish that element.

4, 37 ¶ 4). It is within the court's discretion to accept or disregard a statement of fact not properly supported by the record. M.R. Civ P. Rule 56(h)(4).

A. The Trial Court's dicta on Plaintiff's standing was not part of the findings.

The Trial Court found Plaintiff's standing sufficient to enter the Summary Judgment. (A. 20). The Trial Court's footnote regarding the insufficiency of the record precluding the Plaintiff from being able to obtain a summary judgment in its favor was offered as obiter dicta. (A. 18-19, footnote 7). The statements were placed in a footnote and the plain language of the footnote indicates that it was offered as a hypothetical only tangentially related to the issues before the court. *Id.* It was not meant to be part of the findings binding on the parties, rather it signaled to the parties that the record relating to that element of the claim was incomplete. Although, standing is a jurisdictional issue that may be taken up by the court at any time, Defendant did not challenge standing in her motion for summary judgment.

B. Facts may be admitted for the purpose of a summary judgment.

The assignment of the Mortgage to Plaintiff was supported by the Quitclaim Assignment provided by Plaintiff and a supporting affidavit (A. 66, 90). Although

the Quitclaim Assignment alone may be insufficient to establish ownership of the mortgage, the Plaintiff maintains that it could establish standing at trial. (Appellant's Br. 23-24). Not only was the fact that Plaintiff had standing not controverted by either party, it was affirmatively admitted by both parties. (A. 34 ¶ 4, 37 ¶ 4). The Plaintiff maintains that it would be able to prove that it is the proper owner of the Mortgage at trial. (Appellant's Br. 23-24). The question of Plaintiff's authority to act on behalf of the Government Nation Mortgage Association has been considered before. *Carrington Mortg. Servs. v. Gionest*, Docket No. 2:16-cv-00534-NT, 6-9 (D. Me. Mar. 19, 2020). In *Gionest*, the court excluded the limited power of attorney from evidence because they failed to establish that the mortgage at issue in that case was covered by the limited power of attorney presented. *Id* at 6. The court went on to illustrate how the limited power of attorney could have been properly submitted into evidence if necessary supporting documentation and competent testimony was provided. *Id* at 8-9. Because the matter before the court can be fully resolved as a matter of law on the issues raised in Defendant's Motion for Summary Judgment, it would be a waste of judicial resources to require the parties to conduct a trial to establish the other elements of foreclosure.[3]

[3] The court in Gionest also asserted that there is a distinction between constitutional and statutory standing, and that a failure to establish statutory standing goes to the merits of a claim not the court's jurisdiction over the parties, which allows the court to issue a dismissal with prejudice on a foreclosure claim. *Gionest* at 8-9.

C. The issue on standing is not properly before the Court.

To the extent an issue must be preserved in order to be appealable, the issue was not properly preserved. The Plaintiff did not raise its lack of standing as an issue and therefore did not properly preserve the right to object to its standing on appeal. *Warren Constr. Grp., LLC v. Reis*, 2016 ME 11 ¶9, 130 A.3d 969 (Me. 2016); *citing Alexander, Maine Appellate Practice* § 402(a) at 243 (4th ed.2013); *see also Teel v. Colson*, 396 A.2d 529, 534 (Me.1979) ("It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below"). The Plaintiff does not claim that there is a lack of standing in its appeal, and actually asserts that it could establish standing at trial. (Appellant's Br. 23-24). Defendant has not challenged standing, and admitted to standing for the purposes of her motion for summary judgment. (A. 34 ¶ 4, 37 ¶ 4). The Plaintiff did not raise the issue of standing in its motion to dismiss, nor did it reply to Defendant's opposition to the motion to dismiss. (A. 25). Plaintiff raises the issue of the sufficiency of standing for the first time in this appeal. The issue of Plaintiff's standing was not properly preserved by Plaintiff and is therefore not properly before this Court.

Defendant only challenged the legal sufficiency of one of the eight foreclosure elements in her summary judgment motion. Plaintiff asserted standing in its initial complaint. (A. 22 ¶7). Had the standing issue been addressed by the parties, Plaintiff likely would have pointed to the reference to 12 U.S.C., 1721(g) in the quitclaim assignment, which authorized the Government National Mortgage Association (Ginnie Mae) to act on behalf of Taylor, Bean & Whitaker and offered the requisite power of attorney documents either recorded and/or part of the bankruptcy records to establish standing.[4] However, standing was admitted by the Defendant in Paragraph 4 of Defendant's Statements of Material Facts and admitted in Paragraph 4 of Plaintiff's Opposing Statement of Material Facts (A. 34 and 37). Since standing was admitted by both parties, and since Plaintiff asserts that it could establish standing at trial in its Appellate Brief, the issue of standing should be deemed sufficient for the purposes of this appeal. (Plaintiff's Appellate Brief Page 24).

[4] The argument relating to the sufficiency of the Quitclaim Assignment having been raised for the first time on appeal are not properly before the court and are therefore only addressed briefly in this footnote:

Maine's recording statues are preempted by the federal regulations relating to the Ginnie Mae's ability to receive and transfer its interests in mortgages. 12 U.S.C., 1721(g). Maine foreclosure law affirmatively states that it is subject to federal preemption in other aspects. 14 M.R.S. §6326(1) (Public sale provisions are subject to 12 Code of Federal Regulations §1024.41). "...No State or local law, and no Federal law (except Federal law enacted expressly in limitation of this subsection after October 8, 1980), shall preclude or limit the exercise by the Association of (A) its power to contract with the issuer on the terms stated in the preceding sentence, (B) its rights to enforce any such contract with the issuer, or (C) its ownership rights, as provided in the preceding sentence, in the mortgages constituting the trust or pool against which the guaranteed securities are issued." 12 U.S.C., 1721(g) (*emphasis added*).

CONCLUSION

For the reasons set forth herein, the Appellee, Camille Moulton, respectfully requests that this Court deny the appeal of the Appellant.

Dated: May 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, that on this date, I have placed in the mail, for delivery by United States Postal Service, or other delivery means including FedEx or UPS, postage or delivery charges pre-paid, two (2) copies of the Appellee's Brief, addressed as follows:

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I further certify a pdf copy of the Appellee's Brief was submitted to the Clerk of Law Court and to Appellant at the email addresses provided by each.

Dated: May 31, 2022

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